The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 548
INTRODUCER:	Senator Brandes
SUBJECT:	Electronic Legal Documents
DATE:	March 29, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Pre-meeting**
2.			GO	
3.			RC	

I. Summary:

SB 548 authorizes the use and legal validity of online notarizations and certain electronic legal documents in Florida.

Significantly, the bill:

- Permits notaries, civil-law notaries, and commissioners of deeds to register as online notaries and provide remote online notarizations through two-way, remote audio-visual communication technology.
- Requires substantial record-keeping and security protocols for online notaries, including third-part identify verification (credentials analysis), and provides for the use of Remote Online Notarization (RON) platforms and software to facilitate online notarizations.
- Authorizes online notarization oversight, rulemaking, and training by the Department of State.
- Permits an online notary to notarize electronic signatures on wills, powers of attorney, and documents conveying real property, and requires the notary to issue a colloquy in the case of wills and powers of attorney enumerating certain powers, such as changing a beneficiary.
- Permits an online notary to notarize the electronic signature of a testator and witnesses to an electronic will through audio-visual communication technology.
- Provides that electronic wills may become self-proving if a qualified custodian is appointed to maintain custody of the will until the testator's death.

The effective date of the bill is January 1, 2020, except that the Department of State's rulemaking authority is effective upon becoming law.

II. Present Situation:

Part 1: Notaries Public in Florida

A notary public is a public officer under the Florida Constitution,[1] and "and an impartial agent of the State."[2] "[I]n the performance of his or her duties, [a notary public] exercises a delegation of the State's sovereign power as in attesting the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained and in administering oaths and attesting to the authenticity of signatures."[3]

As a public officer, notaries public are constitutionally required to give a bond (as required by law) and swear or affirm to uphold the Constitutions of the United States and Florida.[4] Notaries public are appointed and commissioned by the Governor to four-year terms,[5] and are authorized under Florida law to perform six basic duties:[6]

- Administer oaths or affirmations.[7]
- Take acknowledgments.[8]
- Solemnize marriages.[9]
- Attest to photocopies.[10]
- Verify vehicle identification numbers (VINs).[11]
- Certify the contents of a safe-deposit box.[12]

Importantly, a notary may only exercise the foregoing duties within the physical boundaries of the State of Florida.[13] Generally, a notary may not charge more than $10 per notarial act and may not charge a fee for notarizing a vote-by-mail ballot.[14]

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[1] Art. II, s. 5, FLA. CONST.
[2] 58 AM. JUR. 2D Notaries Public § 1.
[3] *Id.* (footnotes omitted). *See also* BLACK'S LAW DICTIONARY (10th ed. 2014) ("The notary public, or notary, is an official known in nearly all civilized countries. The office is of ancient origin. In Rome, during the republic, it existed, the title being *tabelliones forenses*, or *personae publicae*; and there are records of the appointment of notaries by the Frankish kings and the Popes as early as the ninth century. They were chiefly employed in drawing up legal documents; as scribes or scriveners they took minutes and made short drafts of writings, either of a public or a private nature. In modern times their more characteristic duty is to attest the genuineness of any deeds or writings, in order to render the same available as evidence of the facts therein contained.") (quoting Benjamin F. Rex, *The Notaries' Manual* § 1, at 1–2 (J.H. McMillan ed., 6th ed. 1913)).
[4] *See* n. 1, *supra*. *See* s. 117.01(3) & (7), F.S. ((3) requiring that, as part of oath, notary must swear he or she understands the English language, has read ch. 117, and understands duties, responsibilities, limitations, and powers; (7) requiring that notary give a bond in the amount of $7,500 in the event the notary breaches duties, both a physical and electronic copy of which is to be kept on file with the Department of State).
[5] Section 117.01(1), F.S.
[6] Executive Office of the Governor, State of Florida, *Governor's Reference Manual for Notaries Public*, p. 13 (Dec. 13, 2016), available at https://www.flgov.com/wp-content/uploads/Notary_Reference_Manual_12.13.16.pdf.
[7] Section 117.03, F.S.
[8] Section 117.04, F.S.
[9] Section 117.045, F.S.
[10] Section 117.05(12)(a), F.S.
[11] Section 319.23(3)(a)2., F.S.
[12] Section 655.94(1), F.S.
[13] *See* n. 5, *supra*.
[14] Section 117.05(2), F.S.

A notary public may provide an electronic signature so long as it is (1) unique, (2) verifiable, (3) under the notary's sole control, and (4) attached to a document in a way revealing any subsequent alteration.[15] In other words, the electronic signature must not be easily replicated.

When a signature must be accompanied by a notary public seal, the requirement is met when the notary public includes his or her full legal name, the words "Notary Public State of Florida," the expiration date of the notary's commission, and the notary's commission number.[16] The seal may also be applied to a physical paper copy using a rubber stamp containing the foregoing information.[17]

As a public officer, a notary public is held to high standards and is subject to discipline, including suspension by the Governor and removal by the Senate, for malfeasance, misfeasance, or neglect in the performance of his or her duties.[18] A notary public is also subject to criminal penalties for certain unlawful uses of the notary commission (such as notarizing his or her own signature),[19] and liable to pay fees for certain civil infractions (such as notarizing a document when the signor is not in the notary's presence).[20]

Becoming a Notary Public in Florida

In order to be qualified to become a notary public in Florida, a person must:
- Be at least 18 years of age;
- Be a Florida resident or permanent resident alien with a recorded declaration of domicile;
- Maintain Florida residence throughout the appointment; and
- Be able to read, write, and understand the English language.[21]

To apply to become a notary public in Florida, the application form provided by the Department of State must be completed, signed, sworn, and filed along with the appropriate applications fees.[22] Because the bond must be attached, the bonding agency usually submits the application in both a paper and electronic format.[23] The oath of office and notary bond must accompany the notary's application when filed with the Department of State.[24]

Applicants must also provide or attach the following as part of the application:
- Personal identification information;
- Affidavit of good character from a reference who has known the applicant for at least one year and is not a relative;
- Ten-year history of any licenses and discipline;

[15] Section 117.021(2), F.S.
[16] Section 117.021(3), F.S.
[17] Section 117.05(3), F.S.
[18] Art. IV, s. 7, FLA. CONST.; s. 117.01(4), F.S.
[19] Section 117.05(1), F.S. (providing violation is a third degree felony). *See also* s. 117.05(3)(d), (7), & (8), F.S.; s. 117.105, F.S.; s. 117.107, F.S.
[20] Section 117.107(9), F.S. (providing violation is a civil infraction punishable by a fine of up to $5,000).
[21] *See* n. 5, *supra*.
[22] Section 117.01(2), F.S. (requiring $25 application fee, $10 commission fee, and $4 educational surcharge, except that the commission fee is waived for veterans with a 50 percent disability).
[23] *See* n. 6 at p. 7, *supra*.
[24] *Id*.

- Statement regarding whether the applicant has ever been convicted of a felony or had his or her civil rights restored; and
- Any other information requested by the Governor's office to confirm eligibility.[25]

Notary's Duty to Confirm Identity and Physical Presence for Signing

One of the notaries public primary duties is to verify the identity of the person who is signing a document. If the person is personally known to the notary public or provides "satisfactory evidence" by producing valid identification or witnesses, or both, verifying that the person is who he or she claims to be, then the notary may notarize the document.[26]

Additionally, generally the person signing the document, as well as any witness, must be in the notary's physical presence at the time of presenting identification and signing.[27] It is the physical presence requirement that the proposed bill seeks to redefine.

Remote Online Notarization (RON)

Because of audio/video technologies, such as FaceTime and Skype, two or more people may be able to both see and hear one another in real time using a computer or mobile device, even though they are in different states. This means a notary public can view a person's face, using audio/video technology while simultaneously reviewing the person's identification and other credentials.

One article explains how remote online notarization works:

> The process is pretty straightforward: You upload a document to an app or website and get connected with a notary by video, on a split screen; you verify your identity by showing a government-issued photo ID, and the notary witnesses you signing your name on screen using your finger or mouse. Then, the notary adds their electronic signature and a digital version of a stamp or seal. The whole transaction is recorded and secured on the cloud in compliance with retention rules; both the signer and the notary can get copies.
>
> Right now, even though notarization apps and sites are accessible by everyone, the participating notaries themselves are certified and based only in Virginia and Texas. Nevada will also join those states; it enacted a remote notarization law on June 9.[28]

Virginia was the first to pass a remote online notarization or RON law in 2012.[29]

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[25] *Id.*
[26] Section 117.05(5), F.S.
[27] Section 117.05(4), F.S. *See also* Effect of the Bill, Part I, *infra*, amending multiple provisions in chapter 117, F.S., to clarify that "physical presence" can include an appearance by audio/video technology.
[28] Lauren Silverman, *Notaries are Starting to Put Down The Stamp and Pick Up a Webcam*, National Public Radio, All Tech Considered (June 12, 2017), https://www.npr.org/sections/alltechconsidered/2017/06/12/532586426/notaries-are-starting-to-put-down-the-stamp-and-pick-up-a-webcam (last visited Mar. 29, 2019).
[29] *Id. See* Office of the Secretary of the Commonwealth of Virginia, Notary Public Division, *A Handbook For Virginia Notary Publics*, https://governor.virginia.gov/media/2089/NotaryHandbook.pdf (last visited Jan. 29, 2018). *See also*

Since the above article was written in June 2017, multiple states have passed RON laws. In 2018, six states—Indiana, Michigan, Minnesota, Ohio, Tennessee, and Vermont—passed RON laws. In 2019, more than 20 states introduced RON legislation,[30] including North Dakota, South Dakota, Idaho, and Kentucky, all of which have already passed and been signed into law. Nebraska and Arizona are expected to pass RON laws in 2019 as well.[31]

Commissioner of Deeds

Generally, a commissioner of deeds is similar to a notary public, except a commissioner may complete certain notarial acts outside the state of appointment (either in other states or foreign countries) that will be recognized by the state of appointment.[32]

Under Florida law, commissioners of deeds serve a more limited function, notarizing timeshare-related documents executed in foreign countries. A commissioner of deeds appointed in Florida may take acknowledgments, proofs of execution, and oaths in connection with the execution of any deed, mortgage, deed of trust, contract, power of attorney, or any other writing to be used or recorded *specifically* in connection with a timeshare estate, personal property timeshare interest, timeshare license, any property subject to a timeshare plan, or the operation of a timeshare plan located in Florida. However, the commissioner of deeds can *only* do the foregoing notarial acts related *only* to timeshares when such instruments or writings are executed *outside* the United States.[33]

A commissioner of deeds also takes acknowledgments, proofs of execution, and oaths in the same manner as notaries under ch. 117, F.S. A commissioner's certification must be endorsed on or annexed to an instrument or writing and has the same effect as if made by a Florida notary public. [34]

Like notaries publics, a commissioner of deeds is appointed by the Governor to a term of 4 years. A person seeking to be appointed as a commissioner of deeds must take an oath before a notary public in Florida or any other state, or a person authorized to take oaths in another country, to well and faithfully execute and perform the duties of a commissioner of deeds.[35] The oath must be filed with the Department of State prior to the person being commissioned.[36]

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https://www.notarize.com/availability, a Virginia-based online platform offering online notary services. The video on the homepage also explains how the process works. *Id.* (last visited March 29, 2019).

[30] Andrew Macdougall, *North Dakota Enacts Remote Online Notarization*, Notarize.com (March 13, 2019), available at https://www.notarize.com/blog/north-dakota-enacts-remote-online-notarization (last visited Mar. 29, 2019).

[31] Andrew Macdougall, *South Dakota Adopts Remote Online Notarization*, Notarize.com (March 21, 2019), available at https://www.notarize.com/blog/south-dakota-adopts-remote-online-notarization (last visited Mar. 29, 2019).

[32] BLACK'S LAW DICTIONARY (10th ed. 2014).

[33] Chapter 721, F.S., governs vacation and timeshare plans. *See* s. 721.96, F.S. (stating that one of the chapter's purposes is to appoint commissioners of deeds); s. 721.97(1), F.S. (Governor may appoint a commissioner of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country, in international waters, or in any possession, territory, or commonwealth of the United States outside the 50 states).

[34] Section 721.97(1), F.S.

[35] Section 721.97(2), F.S. *Also see* International Society of Florida Commissioners of Deeds, *Reference Manual for Commissioners of Deeds For the State of Florida* (Aug. 2009)(on file with Senate Judiciary Committee).

[36] *Id*.

Civil-Law Notaries

A civil-law notary is an attorney who is also a notary public. Civil-law notaries are appointed by the Florida Department of State pursuant to chapter 118, F.S., to attest to and authenticate the validity of documents that may be used in foreign countries that adhere to civil law (such as Latin American countries) as opposed to common law (United States, Great Britian, etc.). As one article explains:

> What distinguishes a Chapter 118 civil-law notary is that he or she is authorized to authenticate documents not merely by witnessing a signature or taking an oath, **but also by verifying and confirming the truth of the statements contained within the documents.** When appropriate, the Florida civil-law notary also may verify and confirm the applicable law and include that verification in the authentic act. When serving this function, the civil-law notary acts as an independent third party to the transaction (if there is more than one party to the transaction). This process of verifying and confirming representations of fact and authenticity of a document can arise in an infinite variety of contexts when an individual uses a document from the United States to prove a fact in a foreign civil-law jurisdiction. A few examples reviewed here include verification of facts and law determining heirship in a real-estate context, proper execution of a power of attorney in connection with a sale of real property in a civil-law jurisdiction, and establishment of identity, maternity, paternity, or other relations in connection with litigation.[37]

To qualify for appointment as a civil-law notary, a person must (1) be a licensed Florida attorney (2) in good standing with The Florida Bar (3) who has been practicing law for at least 5 years. Those qualified may apply through the Florida Department of State.[38]

Uniform Electronic Transaction Act

Section 668.50, F.S., is known as the Uniform Electronic Transaction Act (act). The act applies to electronic records and signatures relating to a transaction.[39] The act does not apply to transactions to the extent they are governed by:[40]

- A provision of law governing the creation and execution of wills, codicils, or testamentary trusts;
- The Uniform Commercial Code (UCC);[41] or
- The Uniform Computer Information Transaction Act.

[37] J. Brock McClane & Michael A. Tessitore, *The Florida Civil-Law Notary: A Practical New Tool for Doing Business with Latin America*, 32 STETSON L. REV. 727, 735 (2003) (emphasis added)(footnotes omitted) (discussing history and purpose of law creating civil-law notaries, to encourage international business particularly with civil law nations of South America). *See also* ss. 118.10, 118.12, F.S.
[38] Florida Department of State, Notary Public Access System, *Civil Law Notary Names and Locations List*, available at http://notaries.dos.state.fl.us/civil.html (last visited Mar. 29, 2019). *See also* Admin. R. 1N-6.001.
[39] Section 668.50(3)(a), F.S.
[40] Section 668.50(3)(b), F.S.
[41] Other than s. 671.107, F.S., and chapters 672 and 680, F.S. The UCC consists of chapters 670 - 680, F.S.

Part 2: Wills in Florida

A will is a legal document that a person (a "testator") may use to determine who gets his or her property when he or she dies. As set forth in the Florida Probate Code, as chs. 731-735, F.S., the legal definition of a will is:

> an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.[42]

Wills do not dispose of all of a testator's property, but only his or her "estate," i.e., those assets that are subject to probate administration.[43] Probate is "a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries."[44] Other assets are disposed of outside of probate.[45]

Without a will, a decedent's estate will be distributed pursuant to the intestacy statutes, which devise a decedent's estate according to what might be described as default rules. With a will, however, a testator may, as a general matter, devise his or her estate to whomever he or she likes. Also, with a will, a testator may designate a person known as a personal representative to carry out the terms of the will. Otherwise, a court will choose the personal representative.

Execution of a Will

A will must be "in writing" and signed at its end by either the testator or by someone else for the testator. If someone else signs for the testator, the person must do so in the testator's presence and at the testator's direction.[46] At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that he or she previously signed the will or that another person subscribed the testator's name to the will.[47] These witnesses must sign the will in the presence of each other and the testator.[48] For wills executed in other states, the requirements may be different.[49] The consequence of failing to strictly comply with these requirements is that

[42] Section 731.201(40), F.S.
[43] *See*, s. 731.201(14), F.S.
[44] The Florida Bar, *Consumer Pamphlet: Probate in Florida*, https://www.floridabar.org/public/consumer/pamphlet026/ (last visited March 28, 2019).
[45] For example, the terms of a decedent's bank account may include a beneficiary clause, giving the account to whomever the decedent names.
[46] Section 732.502(1)(a), F.S.
[47] Section 732.502(1)(b), F.S.
[48] Section 732.502(1)(c), F.S.
[49] *See*, s. 732.502(2), F.S. A will executed in another state is valid in Florida if the will is executed in accordance with the laws of this state, the laws of the state in which it was executed, or both. This does not apply to nuncupative wills (oral wills) or holographic wills (wills written in the hand of the testator, but not properly executed as set forth in s. 732.502(1), F.S.), which are not valid in Florida regardless of whether they were executed according to the laws of the state in which they were executed.

the will is not valid.[50] A codicil (amendment) to a will must be executed in the same manner as a will.[51]

Though s. 732.502(1), F.S., specifies that a will must be "in writing" and that certain persons must "sign" or attach their "signature," these terms are not defined in the statutes. Moreover, there is no explicit statement in the Florida Probate Code that an electronic will is invalid, that an electronic signature is invalid, or that a will must be executed on paper.

Some have asserted that an electronically-signed will is not valid in Florida, but s. 668.004, F.S., states that, "[u]nless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."[52] An electronic signature, as defined in s. 668.003(4), F.S., is:

> any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

Storing a Will

The Florida Probate Code does not specify how a will must be stored.

Probate and Proving a Will

To acquire a court order distributing the testator's estate assets in line with the terms of a will, the will must be probated.[53] The venue for a probate proceeding is set forth in s. 731.101(1), F.S., which states:

> (1) The venue for probate of wills and granting letters shall be:
> (a) In the county in this state where the decedent was domiciled.
> (b) If the decedent had no domicile in this state, then in any county where the decedent's property is located.
> (c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

For a will to be admitted to probate in Florida, it must be "proved."[54] No statute describes what it means for a will to be proved or what it is about the will or purported will that is being proved. However, it is apparent that proving a will means proving that the will is what it purports to be, i.e., the last will and testament of the testator and that it was validly executed.

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[50] *Allen v. Dalk*, 826 So.2d 245, 247 (Fla. 2002).
[51] Section 732.502(5), F.S.
[52] The Uniform Electronic Transaction Act is set forth in s. 668.50, F.S. It includes a statement that the "section" does not govern, among other things, a transaction that is governed by a law governing the creation and execution of wills. Section 668.004, F.S., which provides broad permission to electronically sign a document, is of course a different section. But even if it were not, or even if it did not exist, s. 668.50, F.S., would not appear to *prohibit* electronically signing a will.
[53] *See* s. 733.103(1), F.S.
[54] Section 733.201(1), F.S.

Proving a Will

A will may be proved by having one of the attesting witnesses swear or affirm an oath regarding the will before a circuit judge or any of the other persons set forth in s. 733.201(2), F.S. If it appears to the court that no attesting witness can be found, that no attesting witness still has capacity, or that the testimony of an attesting witness cannot be obtained within a reasonable time, the court must resort to another method of proving a will. The other method is through an oath of the personal representative nominated by the will or a different person who has no interest in the estate under the will. This oath must include a statement that "the person believes the writing exhibited to be the last will and testament of the decedent."[55]

Making a Will Self-Proved

A will may be made self-proved. A self-proved will may be admitted to probate without further proof, such as the testimony mentioned above.[56] For a will to be self-proved in this state, the testator must acknowledge the will before an officer authorized to administer oaths (e.g., a notary public). The attesting witnesses must make affidavits before the officer. Lastly, the officer must evidence the acknowledgement and affidavits by a certificate attached to or following the will.[57]

Even after a will is proved and admitted to probate, it may be contested.[58] There are several grounds, such as fraud and undue influence, on which a self-proved will might be contested.

Custodian's Duty to File with Court

The custodian of a will must deposit the will with the court within 10 days after receiving information of the testator's death.[59] If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability:

> Upon petition and notice, the custodian of any will may be compelled to produce and deposit the will. All costs, damages, and a reasonable attorney's fee shall be adjudged to the petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will.[60]

[55] Section 733.201(3), F.S.
[56] Section 733.201(1), F.S.
[57] The officer's certificate must be substantially in the form set forth at s. 732.503, F.S. The form requires that the witnesses state that they witnessed the testator *sign* the will. However, the statutory requirements for executing a will do not require witnesses to witness the testator sign the will. Section 732.502, F.S., provides that the witnesses may either witness the testator sign, or witness the testator acknowledge his or her prior signature.
[58] *See, Powell v. Eberhardt (in Re Estate of Hartman)*, 836 So.2d 1038, 1039 (Fla.2d DCA 2002).
[59] Section 732.901(1), F.S.
[60] Section 732.901(2), F.S.

Other States' Treatment of Electronic Wills

It appears that Nevada is the only state that, by statute, expressly permits the use of electronic wills.[61] This statute has been in effect since 2001.[62]

Although the legislative bodies in Arizona, Indiana, New Hampshire, and Virginia each brought forward an electronic wills act bill in 2017,[63] none passed. As already noted, however, Virginia allows documents to be notarized through live video and audio technology.[64]

Additionally, in Tennessee, a court held that a testator validly signed his will when he typed his name in cursive font.[65] In Ohio, a court admitted a will to probate that was written and signed with a stylus on an electronic tablet.[66]

III. Effect of Proposed Changes:

The effect of the bill will be addressed in four parts:
Part 1 will address bill sections 1-17 relating to Remote Online Notarization (RON).

- Part 2 will address bill section 31-40 relating to electronic wills.
- Part 3 will address bill sections 18-30 making collateral changes to other statutes to fully implement Parts 1 and 2.
- Part 4 will address bill section 41, the effective date.

Part 1 of the Bill: Online Notary Publics (Sections 1– 17)

Section 1 of the bill divides ch. 117, F.S. into two parts: Part I entitled "General Provisions" (ss. 117.01-.108, F.S.) and Part II entitled "Online Notarizations" (ss. 117.201-.305, F.S.).

Sections 2 through 5 of the bill amend current provisions of chapter 117, F.S., which will become part of Part I, "General Provisions." The "General Provisions" generally govern how a person may become a notary public and set out the duties and responsibilities of a notary. *See* Present Situation, *supra*.

Safety of Electronic Signatures and Rule Promulgation—Of the substantive changes, section 3 of the bill provides that a notary must use a password- or code-protected electronic signature, and, presumably for security reasons, the notary cannot be required to use technology the notary has not selected (s. 117.021(2), (4), F.S.). Additionally, the Department of State, in collaboration with the Agency for State Technology, is required to adopt rules establishing standards for

[61] *See* Nev. Rev. Stat. s. 133.085.
[62] *See* Dan DeNicuolo, *The Future of Electronic Wills*, American Bar Association, available at https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_38/issue-5--june-2017/the-future-of-electronic-wills/ (last visited Mar. 29, 2019).
[63] *Id.* (noting that Florida passed a version of the electronic wills act in 2017 but it was vetoed by Governor Scott).
[64] Va. Code Ann. S. 47.1.
[65] *Taylor v. Holt*, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003). *See also*, n. 62, *supra*.
[66] *In re Estate of Javier Castro, Deceased*, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge). *See also*, n. 62, *supra.*

"tamper-evident" technologies that will indicate if an electronically notarized document has been altered by January 1, 2020 (s. 117.021(7), F.S.).

Use of Notary Commission, Forms, and Accommodating Disabled Persons—Section 4 of the bill clarifies that online notarizations must be done in compliance with Part II (s. 117.05(5)). The bill also provides an additional form certificate a notary must use when notarizing an attested copy of an electronic document (s. 117.05(12)(c),F.S.).

Additionally, the bill amends the various notarial form certificates in s. 117.05, F.S., to add an option for the notary to select whether an oath or affirmation or a an instrument was acknowledged "by means of [ ] physical presence or [ ] online notarization[.]"

Finally, when a notary must be sign at the direction and on behalf of a person who is physically unable to sign or mark a document, the notary must now maintain proof this direction and authorization for at least 10 years (s. 117.05(14)(d), F.S.).

Prohibited Acts—Section 5 of the bill provides that the prohibition in s. 117.107(2), F.S., does not apply to electronic signatures and seals necessary to perform online notarizations. Additionally, s. 117.107(9), F.S. prohibits a notary from notarizing the signature of a person who does not "appear" either in person or, as provided in Part II, by means of audio-video technology.

Other Changes—Section 2 makes technical changes to s. 117.01(1), F.S. Sections 3, 4, and 5 also contain technical changes.

Sections 6 through 19 of the bill create Part II adding new provisions to chapter 117, F.S., to govern the provision of remote online notarization (RON).

Application of "General Provision" in Part I—Sections 6, 7, 9, and 10 of the bill (ss. 117.201, 117.209, 117.225, and 117.235, F.S., respectively) clarify the application of Part I's "General Provisions" to online notary publics, which includes notary publics under chapter 117, Part 1, civil-law notaries appointed under chapter 118, and commissioners of deeds appointed under chapter 721 (s. 117.201(10), F.S.). Online notary publics:

- Must satisfy all the traditional requirements for becoming a notary public under Part I.
- Are subject to Part I in carrying out their duties.
- May perform any of the traditional notarial acts listed in Part I online, *except* online marriage rites.

In other words, the requirements of Part II are additional to the requirements of Part I for those wishing to become an online notary public.

Definitions and Key Concepts—Section 6, s. 117.201, F.S., provides definitions used throughout Part II concerning the use of audio-video technology by a notary public to verify a person's identity remotely. Some of the key definitions include:

- "Appear before," "before," or "in the presence of," mean either that the notary public and the "principal," or person seeking the performance of a notarial act, are either in the same physical location (*see also* "physical presence"), or are in different physical locations but using real-time, two-way "audio-video communication technology" that permits the

notary and the person to see, hear, and communicate with one another such that an "online notarization" can be performed. (s. 117.201(1), (2), (9), (11), (12), F.S.).

- "Credential analysis," "identity proofing," and "knowledge-based authentication" all relate to the third party verification of a "government issued identification," using public or proprietary data sources, which may include a set of individual questions generated by these sources or biometric verification. (s. 117.201(3), (6), (7), (8), F.S.).
- "Remote presentation" refers to the presentation of a "government issued identification" to a notary public through "audio-video technology" that is sufficiently clear to permit the notary public to engage in "credential analysis" and verify the presenter's identity. (s. 117.201(15), F.S.).
- "Remote online notarization service provider" or "RON service provider" refers to those providing "audio-video technology" and related services to directly facilitate "online notarizations," such as software and data storage, in compliance with rules promulgated by the Department of State. (s. 117.201(9), (14), F.S.).
- "Electronic," "electronic record," and "electronic signature" has the same meaning as in s. 668.50, F.S.; and a "record" means information that is either in tangible or "electronic" form which is retrievable. (s. 117.201(4), (13), F.S.).

Authorization to Perform Online Notarizations and Validity of Online Notarizations—Sections 7, 8, and 13 generally authorize and give effect to online notarizations. In compliance with Florida law and the rules promulgated by the Department of State, the bill authorizes duly registered online notaries to perform any notarial services (except marital rites) online so long as the notary is physically present in Florida at the time. However, a commissioners of deeds may perform online notaries outside of Florida so long as they are within their territorial jurisdiction. (ss. 117.209, 117.265(1), F.S.). The bill also provides that whenever a provision of law requires a notarial act, an online notarization satisfies the law's requirement. (s. 117.215, F.S.).

Registration Requirements—Section 9 (s. 117.225, F.S.) sets out the registration requirements for online notaries. Online notaries must:

- Satisfy qualification requirements of Part I;
- Provide proof of professional liability insurance (the bill adds that it must be $1 million under Part I);
- Submit a signed and sworn registration to the Department of State;
- Identify the RON provider to be used; and
- Confirm that audio/video communication technology and credential analysis/identity proofing methods to be used online comply with the standards promulgated by Part II and any rules promulgated by the Department of State.
- Provide satisfactory evidence of that a bond and errors and omissions insurance have been obtained.

Record-Keeping, Security, and Technology Requirements— Sections 11 and 12 of the bill (ss.117.245, 117.255, F.S.) require an online notary to keep extensive records of each online notarization in one or more electronic journals, which includes retaining a copy of the audio/video and recording the logistical details concerning the date, the identity of the principle and any witnesses, whether their identities were confirmed, and what type of notarial act was completed. These records must be retained for 10 years, except electronic wills must be

maintained in accordance with s. 732.524, F.S.[67] While an incomplete entry into a journal does not impair the validity of a notarial act, it may introduced as evidence in certain actions, such as evidence for fraud, forgery, duress, incapacity, and the like (s. 117.245, F.S.).

The bill also requires that an online notary take strict security measures to keep the electronic journal as well as a back-up of the journal, the notary's electronic signature, and the notary's electronic seal under his or her exclusive possession or control, except that a RON service provider may have access to facilitate online notarizations on behalf of the notary. Additionally, the notary may provide electronic copies of pertinent portions of the electronic journal, or provide access to the audio-visual recording, when requested by the parties, the title agents or insurers in real estate transactions that retained the online notary, the Department of State, or someone asked to accept of power of attorney that was notarized online (s. 117.255, F.S.).

Procedures to Verify Identity of Principles and Witnesses— Sections 13 and 15 (ss. 117.265, 117.285, F.S.) provides that an online notary may notarize documents or supervise the witnessing of electronic records for people in other states so long as the notary verifies the identities of the principle signer and witnesses (s. 117.285, F.S.) at the time of signing; and, if out-of-state, confirms that the principle signer consents to a Florida-based notary public and consents to comply with Florida law (ss. 117.265, 117.285, F.S.). An online notary may verify the identity of a principle signer or a witness as follows:

- The notary's personal knowledge of the person; or
- The remote presentation of a government-issued identification card subjected to a credibility analysis and "identification proofing" using "knowledge-based authentication" (similar to personal questions a credit card company asks to verify identity (mother's maiden name, father's middle name, etc.).

If the notary is not satisfied that a person's identity has been verified, the notary must decline to do the online notarization.

Online Notarization Fee—Section 14 of the bill (s. 117.275, F.S.) permits an online notary to charge a fee not exceeding $25 for online notarizations.

Rulemaking Authority—Section 16 (s. 117.295, F.S.) of the bill provides that the Department of State Technology has rulemaking authority to further specify standards for online notarizations, including technology and education requirements. This provision is effective upon becoming law.

Relation to Federal Electronic Signatures Act— Section 17 (s. 117.305, F.S.), provides that Part II supersedes 15 U.S.C. s. 7002, the federal Electronic Signatures in Global and National Commerce Act. This is expressly permitted by 15 U.S.C. s. 7002 when a state has adopted the Uniform Electronic Transactions Act,[68] which Florida did in 2000.[69] Section 117.305, F.S., also

[67] *See* Part II of the bill, section 36, "qualified custodians."
[68] *See* Uniform Law Commission, Acts, *Electronic Transactions Act*, https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 (last visited Mar. 29, 2019) ("The **Uniform Electronic Transactions Act (UETA)** establishes the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce.").
[69] Section 668.50, F.S.

provides that the requirements in section 15 U.S.C. s. 7001(c) concerning consumer disclosures, and the requirement of 15 U.S.C. s. 7003(b) concerning the delivery of certain legal documents are not superseded or limited.

Part 2 – Electronic Wills (Sections 31-40)

Sections 31 through 40 of the bill create provisions regulating and expressly permitting the use of "electronic wills." The bill also revises several aspects of current law relating to the execution of wills.

Key Definitions and Concepts—Sections 31, 32, and 33 amend or create definitions within the probate code. Section 33 of the bill creates s. 732.521, F.S., to provide definitions and cross-references part II of ch. 117, F.S., for the definitions pertaining to online notarization (s. 732.521(1), (4), (5), F.S.).

Most importantly, section 33 (s. 732.521(3)), F.S., defines an "electronic will" as:

> an instrument, including a codicil, executed with an electronic signature by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or revokes or revises another will or electronic will.

Section 31 of the bill also amends the current definition of a "will" in s. 731.201(4), F.S., to clarify that term includes an "electronic will."

Section 32 amends s. 732.506, F.S. to distinguish how an electronic will or codicil may be revoked since it cannot be destroyed in the same manner as a paper will. Nonetheless, revocation of an electronic will or codicil similarly requires an intent by the testator to revoke the electronic will or codicil accompanied an act by or at the testator's direction obliterating, deleting, cancelling, or rendering unreadable an electronic will or codicil which is sufficient to prove the revocation by clear and convincing evidence.

Section 33 also defines a "qualified custodian" as a person meeting the qualifications under newly created s. 732.524(1), F.S.; and an "electronic signature" as "an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record" (s. 732.521(2), (6), F.S.).

Executing and Filing an Electronic Will— Section 34 (s. 732.522, F.S.) of the bill creates the procedures for electronically executing, witnessing, and filing any document under the Florida Probate Code, including electronic wills, as follows:

- When a signature is required, an electronic signature satisfies the requirement.
- When witnesses are required, witnessing an electronic signature through the audio-visual communication technology specified for online notarization provisions (ch. 117, F.S., part II) satisfies this requirement *if*:
  - The signing is supervised by a notary public under s. 117.285, F.S.;
  - The witnesses' identities are authenticated while signing as part of an online notarization session in accord with s. 117.265, F.S.; and

- These witnesses hear the signer make a statement acknowledging signing.

In addition to the foregoing, for electronic wills, a notary must ask the testator the following list of questions during the online notarization and ensure the testator's responses are satisfactory (similar to a court colloquy to determine if a decision is voluntary and knowing):
(1) Are you 18 years of age or older?
(2) Are you of sound mind?
(3) Are you signing this power of attorney voluntarily?
(4) Are you under the influence of any drugs or alcohol that impairs your ability to make decisions?
(5) Has anyone forced or influence you to include anything in this power of attorney which you do not wish to include?
(6) Did anyone assist you in accessing this video conference? If so, who?
(7) Where are you? Name everyone you know in the room with you.

However, when the testator is a vulnerable adult under s. 415.102, F.S., the execution of an electronic will may *not* be witnessed through audio-video communication technology. The bill places the burden on a contestant to an electronic will to show the testator was a vulnerable adult at the time of execution.

The bill also clarifies that the validity and effect of an electronic will is to be determined in the same manner as in the case of a traditional will.

Probate, Self-Proved Wills, and Proof of Wills—Sections 35, 38, and 39 (ss. 732.523, 732.526, 733.201, F.S.) address self-proof of wills, probate, and proof of wills when they are not self-proved, respectively.

Section 35 creates s. 732.523, F.S. permitting an electronic will, like a traditional will, to be self-proved, i.e., admitted to probate without further proof that it is what it purports to be or that it was executed properly.

The bill provides that an attested electronic will is self-proved if each of the following are met:

- The acknowledgement of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503, F.S., and are part of or attached to the record containing the electronic will;
- The electronic will designates a qualified custodian (section 36, s. 352.524,F.S.);
- The electronic will is held in the custody of the qualified custodian at all times before being offered to the court for probate; and
- The qualified custodian at the time of the testator's death certifies under oath that the electronic will (1) was at all times kept in the custody of the custodian and (2) has not been altered since the date of execution.

Section 38 creates s. 732.526, F.S., concerning the probate of an electronic will and addresses when an "original copy" of the will is offered for probate:

- An electronic copy is deemed filed with the court when electronically deposited through the Florida Courts E-filing Portal.

- A paper copy is deemed filed for probate if it is certified as a true and correct copy by a notary.

Section 39 amends s. 733.201, F.S., to create an exception to the admission of self-proved electronic wills into probate without further proof when there is a substantial failure to comply with the online notarization process in s. 117.265, F.S.

Qualified Custodians, Receiverships, and Relation to Wills—Sections 36, 37, and 40 of the bill create ss. 732.524, 732.525, and 740.10.

Section 36 (s. 732.524) sets out the requirements to serve as a qualified custodian. As noted above, one of the requirements of a *self-proved* will is that is be held at all times by a qualified custodian. A qualified custodian is a person who meets all of the following requirements:

- Is domiciled in and a resident of Florida or is incorporated or organized in Florida.
- Consistently employs a system for ensuring the safekeeping of electronic records and stores electronic records containing electronic wills under the system.
- Furnishes for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's policies and procedures.

The qualified custodian of an electronic must provide access to or information concerning the electronic will, or the electronic will and the electronic record containing the electronic will, only to the testator and such other persons as directed by the written instructions of the testator, or anyone as directed by a court with jurisdiction over the matter.

The bill also provides the process by which a qualified custodian may step down and the timeframe for keeping the electronic will after a testator's death. Additionally, the bill sets out the duties owed by the qualified custodian to the testator, such as maintaining custody of an electronic will and other documents at all times and maintaining the testator's confidentiality.

Most importantly, when a qualified custodian receives information that a testator is dead, the qualified custodian must deposit the electronic will with the court pursuant to s. 732.901, F.S.

Section 37 (s. 732.525) requires a qualified custodian to either (1) post a blanket surety bond of at least $250,000 to cover any acts or omissions; or (2) maintain a liability insurance policy to cover any losses in the aggregate of $250,000 resulting from errors or omissions. Section 37 also permits the Attorney General to petition for the appointment of a receiver if:

- A qualified custodian ceases operation;
- A qualified custodian intends to close without adequate arrangements for the delivery of electronic records;
- Conditions exist suggesting a present danger of records being lost or misappropriated; or
- The qualified custodian fails to post a bond or maintain insurance.

Section 40 of the bill creates s. 740.10 under the "Florida Fiduciary Access to Digital Assets Act." This provision provides that no action taken under the Act "is valid" to obligate someone to deposit a will as required in s. 732.901, F.S.

Part 3 – Collateral Changes and Effective Date (Sections 18-30, 41)

Sections 18-30 and 41 of the bill make conforming or necessary collateral changes to several provisions outside of chapters 117 (notaries) and 731-732 (wills and probate), F.S., most of which apply to the recording of real estate conveyances under of chapter 695, F.S. and the power of attorney under chapter 709, F.S.

Conveyance of Real Estate

Sections 22-27 amend ss. 689.01, 694.08, 695.03, 695.04, 695.25, and 695.28, F.S., to make: technical changes; conforming changes with ch. 117's online notarization provisions; provide additional statutory short forms; clarify the applicability and validity of online notarization in signing or witnessing documents conveying real estate; and clarify that challenges to documents notarized online are not precluded.

Power Of Attorney

Sections 28-30 of the bill amend ss. 709.2119, 709.2120, and 709.2202, F.S. The bill amends ss. 709.2119 and 709.2120, F.S., to add conforming language concerning powers of attorney notarized online.

The bill adds a more substantive provision to s. 709.2202, F.S., and creates additional requirements of an online notary. Section 709.2202(6), F.S., provides that a power of attorney executed by a principle domiciled in Florida but witnessed remotely or notarized online is *not* effective to grant authority over certain actions requiring additional safeguards that must be specifically enumerated in a signed, separate document under subsection (1); i.e., such actions include creating an inter vivos trust, changing a beneficiary, and disclaiming property ownership. However, a grant of such authority may be effective if the principal provides satisfactory answers to a list of questions asked by the online notary during the online notarization (similar to a court colloquy to determine if a decision is voluntary and knowing):

(1) Are you 18 years of age or older?
(2) Are you of sound mind?
(3) Are you signing this power of attorney voluntarily?
(4) Are you under the influence of any drugs or alcohol that impairs your ability to make decisions?
(5) Has anyone forced or influence you to include anything in this power of attorney which you do not wish to include?
(6) Did anyone assist you in accessing this video conference? If so, who?
(7) Where are you? Name everyone you know in the room with you.

Evidentiary Issues: Admissibility and Form of Oaths

Sections 19 and 20 amends ss. 90.803 and 92.50, F.S. Section 19 adds a hearsay exception to the evidence code for the admission of electronic records stored by a qualified custodian and kept in the course of the custodian's regularly conducted business activity, including electronic wills and the audio-video recordings of the execution of such wills (s. 90.803(25), F.S.). Section 20 makes a language changes to the oath requirement (s. 92.50, F.S.).

Clerks of Court

Section 18 of the bill amends s. 28.222, F.S., to permit the clerk of a circuit court to record documents "originally created and executed using an electronic signature" citing to Florida's Uniform Real Property Electronic Recording Act,[70] that are "certified to be true and correct paper printout[s] by a notary public[.]"

Statute of Limitations

Section 21 amends language in s. 95.231, F.S., concerning powers of attorney and wills conveying real property, clarifying that the 5-year limitation applies the instrument will be effective even if it suffers from a complete failure or absence of acknowledgment as opposed to just defective acknowledgement.

Part 4 - Effective Date

Section 41 of the bill provides that, unless otherwise specified in the bill, the effective date is January 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Notaries who wish to provide online services must pay an additional $25 registration fee.

[70] Section 695.27, F.S.

B. Private Sector Impact:

The availability of online notarial services may be more convenient for those who need the services.

The bill may facilitate the creation and storage of wills using an Internet-based service. The associated costs are unknown. Further, if an electronic will can be easily created, many people who do not have a will may decide to execute one. However, some may use the services of an Internet-based service instead of, or in addition to, the services of an attorney.

C. Government Sector Impact:

The bill will likely add to the regulatory and record-keeping responsibilities of the Department of State and the Office of the Governor.

The extent to which the bill will result in an increase in probate cases and associated costs to the judicial branch is unknown.

VI. Technical Deficiencies:

There appears to be a misplaced comma on line 1527 after the word "purpose."

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 117.01, 117.021, 117.05, 117.107, 28.222, 90.803, 92.50, 95.231, 689.01, 694.08, 695.03, 695.04, 695.25, 695.28, 709.2119, 709.2120, 709.2202, 731.201, 732.506, and 733.201.

This bill creates the following sections of the Florida Statutes: 117.201, 117.209, 117.215, 117.225, 117.235, 117.245, 117.255, 117.265, 117.275, 117.285, 117.295, 117.305, 732.521, 732.522, 732.523, 732.524, 732.525, 732.526, and 740.10.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.